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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/501,112	07/07/2004	Robert J Benkowski	0021906.023US	5620
22904 7590 08/06/2009 LOCKE LORD BISSELL & LIDDELL LLP ATTN: IP DOCKETING 600 TRAVIS SUITE 3400 HOUSTON, TX 77002-3095				
EXAMINER				
EVANSKO, GEORGE ROBERT				
ART UNIT		PAPER NUMBER		
3762				
NOTIFICATION DATE		DELIVERY MODE		
08/06/2009		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

hoip@lockelord.com

Office Action Summary

Application No.

10/501,112

Applicant(s)

BENKOWSKI ET AL.

Examiner

George R. Evanisko

Art Unit

3762

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 April 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15, 19, 20 and 24-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15, 19, 20, 24-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SI/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-15, 19, and 24-28 are rejected under 35 U.S.C. 102(e) as being anticipated by Medvedev et al (2004/0152944). Medvedev discloses that the pump speed is changed based on or in response to the diastolic flow rate (e.g. paragraphs 57-61, DQ) and based on the heart rate or pressure (e.g. abstract). In addition, the pump speed is set in accordance with activities, such as sleep, normal activity, or high-energy activity, since the heart rate or other sensed parameters will change in response to these activities affecting the speed of the pump. For claim 19, the system senses pressure through the three feedback waveforms and for claim 8, the system of Medvedev includes an implantable flow measurement device since the implantable device measures flow.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over Medvedev et al. Medvedev discloses the claimed invention except for sensing of diastolic flow rate from the sensed pressure. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the implantable pump and method as taught by Medvedev, with the sensing of diastolic flow rate from the sensed pressure since it was known in the art/the examiner is taking official notice that implantable pumps and methods use the sensed pressure to determine diastolic flow rate to provide the predictable results of a conventional way to easily determine the flow rate from sensed pressure without using other flow sensors.

Response to Arguments

Applicant's arguments with respect to the claims have been considered but are not persuasive. The arguments/statements "In light of *Hakim v. Canon Avent Group PLC*, 479 F.3d 313, 81 U.S.P.Q.2d (BNA) 1900 (Fed. Cir. 2007), Assignee retracts and expressly disavows all arguments made in all related pending and expired applications" and "In light of the mootness of

the previous rejections, Assignee hereby expressly retracts its previous arguments with respect to the previously presented claims in accordance with *Hakim v. Canon Avent Group PLC*, 479 F.3d 313, 81 U.S.P.Q.2d (BNA) 1900 (Fed. Cir. 2007)" have NOT been accepted. Specifically, the examiner has based his examination of this application on the claims, disclosure, and previous arguments made by the Applicant. These arguments are part of the prosecution history and the Examiner has considered these arguments in relation to the language used in the claims, claim limitations, and disclosure limitations. If the Applicant wishes to specifically point out what arguments are incorrect and why, the Examiner will review those specific arguments, but a blanket statement that all arguments have been retracted/disavowed will not be accepted. If all arguments from the past two years are to be disavowed/retracted, it is unclear why the Examiner would be convinced or persuaded by future arguments.

The argument that Medvedev does not "extract" a diastolic pump flow rate is not persuasive. Medvedev uses a flow rate sensor to sense the pump flow rate. The flow rate sensor uses three input variables, motor current waveform, motor speed waveform, and power source voltage (e.g. paragraphs 48, 65) , plus a microcontroller algorithm to determine the flow rate. When the pressure across the pump is a maximum (e.g. para. 59) the diastole/peak minimum flow is "extracted"/determined/used from the flow rate to plug into the DQ equation(s) (along with the separately "extracted" systolic pump flow rate).

The argument that most of the claim limitations are not addressed, such as changing the speed of the pump due to heart rate, is not persuasive. Those limitations are readily apparent and are located throughout the Medvedev reference, such as in the abstract, paragraphs 27, 50, etc. The argument that the Medvedev teaches away from some of the pending claim limitations, such

as the implantable flow measurement device or pressure sensor, is not persuasive. Medvedev uses an “implantable” device to sense flow and to sense pressure and therefore necessarily has an “implantable” measurement device. The argument that Medvedev teaches against using an implantable pressure sensor or flow sensor is not persuasive. Medvedev states that it removes the technical problems associated with “direct” flow sensors (e.g. paragraph 65) and although the pressure sensor and flow sensor of Medvedev may be different than the applicant’s sensors, Medvedev’s pressure and flow sensors still meet the limitations presented in the claim(s) since they sense pressure and flow.

If the applicant wishes to claim a particular flow or pressure sensor or a particular way the diastolic pump flow rate is extracted, those limitations will be examined when presented.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to George R. Evanisko whose telephone number is 571 272 4945. The examiner can normally be reached on M-F 6:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Angela Sykes can be reached on 571 272 4955. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/George R Evanisko/
Primary Examiner, Art Unit 3762

George R Evanisko
Primary Examiner
Art Unit 3762

GRE
8/3/09